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AUTHOR Gottlieb, Michael C.
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ABSTRACT

The ethical problems of the therapist who sees couples or families, who are in conflict and who may wind up in legal battles later, are reviewed. Special problems of confidentiality and the therapist's obligations to each and all are discussed. The background of the development of concepts of confidentiality is discussed and applied to the situation of multiple patients. If more than two persons are present, confidentiality cannot be said to exist in a legal sense. Should therapists stop treating couples and families? The paper asserts that systematically based therapies have a unique ability to address relational problems and, in order to do that, must see clients in interaction. Other options, such as seeing only individuals or keeping separate records for individuals are considered; but the loss of important interactional data could be said to create other ethical dilemmas. Guidelines for record keeping are suggested and examples of ways of dealing with legal situations are reported. The therapist's goal is to do what is legally, ethically, and clinically indicated. (EMK)

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Procedures in Couple & Family Therapy Documentation:

Legal and Risk Management Issues

Michael C. Gottlieb, Ph.D., F.A.F.P.

Independent Practice

Dallas Texas

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In T. Patterson (Chair), The Complete Guide to Documentation in Couple and Family Therapy, Presented at the Annual Meeting of the American Psychological Association, San Francisco, CA

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Procedures in Couple & Family Therapy Documentation:

Legal and Risk Management Issues

Michael C. Gottlieb, Ph.D., F.A.F.P.

Our record keeping guidelines have been largely based on a medical model where there is only one patient. Until the 1950's such rules were not a problem and record keeping was a fairly straight forward and clear cut matter. Confidentiality was maintained and information was released, only when the patient authorized the practitioner to do so. All of this changed in the 1950s when the marital and family therapy movement began, and practitioners saw more than one patient at a time. These forms of treatment, now so deeply ingrained within our training and practice, present a number of unique ethical problems, which I and others have addressed. One of these is record keeping. Unfortunately, many psychologists have little training in the often complex documentation process required to manage records of multiple patients in an ethically appropriate manner that also minimizes legal exposure. Today, in the brief time that I have, I will try to cover some of the basics.

When treating multiple patients, the practitioner's obligation to all is typically equal, except under certain circumstances such as child abuse. That is, assuming it has been so established at the outset, each adult, and in some states older teenagers, is a patient and has the same rights as the others. Differences exit with children which I will touch on later.

Typically patients have a statutory privilege regarding confidentiality, and must sign a waiver in order for a practitioner to release their records. This is not the case with couples and families. The reason is a bit obscure but very important. Concepts of confidentiality are derived from the priest/penitent relationship. English common law developed with the notion that confidentiality, by definition, is that which takes place in

a conversation with two people. If more than two people are present, confidentiality cannot be said to exist. Unfortunately, this is still legally the case. (By the way, we are not the only ones who have this problem. I might add that group therapists are plagued with these issues as well.)

Such a situation might lead the faint of heart to not put themselves in such a position and choose to only see individuals. This is certainly a defensible choice, however, those of us who are systemically oriented see these types of treatment as highly effective and are willing to deal with the greater complexities it entails. For us, there are certain advantages that are irreplaceable.

First, The major contribution of systemically based therapies is their unique ability to address relational problems. How are we to treat relational problems by seeing individuals? While there is an argument for doing so in certain circumstances, such as spousal abuse, as a general matter I think most would agree that it is at least impractical if not wasteful to treat relational issues by individual therapy. It is certainly not indicated in order to make life easier for the psychologist's record keeping system.

Second, if we saw individuals, significant and precious information would be lost, namely, the rich interactional data that is so vital to the contextual nature of our work. Seeing people separately precludes the possibility of making these vital observations. Furthermore, I am forced to wonder about the ethical issue of deliberately refusing to obtain interactional data that is directly relevant to the presenting problem when it could have been easily obtained.

Third, some argue for seeing couples and families and keeping separate records. Doing so creates the same problem that would arise in my second point. The rich nature of the interactional data would be lost. However, this practice raises an additional problem. We know that there is an overwhelming amount of empirical data to support the idea that behavior is contextually based. One can only wonder how valid a record would

be that had individual data within it that was actually gathered in an interactional context. (I will discuss this in more detail below.)

Finally, not keeping co-mingled records raises issues regarding competence and adequate treatment. Systemically oriented psychologists keep records which include interventions, how the family responds, and plans for the future based upon the results of the intervention. Without co-mingled records, recording such information becomes impossible and leads me to wonder if such a system would fall below the standard of care.

Guidelines

So even if courageous family practitioners proceed despite the absence of statutory privilege, we are still bound by ethical codes and state regulations that require our treating the information as confidential. As result, certain procedures much be followed.

First, couples or family members must be informed at the outset regarding the psychologist's record keeping policy. They should be told that records will be co-mingled and the reason explained.

Second, they should also be informed regarding procedures for the release of information. Specifically, they need to understand that all those legally able to consent must agree to the waiver before information can be released. In the absence of consensus, the psychologist is not free to release the information.

Special Circumstances

There are numerous legal circumstances where having co-mingled records can at least be problematic.

Divorced Parents

A straight forward situation arises when a couple you have seen in the past later divorces and one of them requests their records. By now it should be obvious that the

psychologist is not free to release the information without the consent of the former spouse and should remind the former patient who requested the record. The person may remember the conversation and respond, "Well can't you just tell my new doctor about me?'

Agreeing to do so seems appealing, but unfortunately the answer is not so simple. As I mentioned above, systemically oriented therapists know that behavior varies as a function of context. This theoretical assumption is well grounded in research largely from social psychology. It is simply not true that we are the same no matter where we are. Now, you are being asked to give the new therapist information about his or her individual patient whom you have only seen in a relational context. How do you know that his or her behavior would have been the same had you seen him or her individually? Well, you don't. Therefore, it you choose to provide individual data, it is prudent to inform the new therapist that your data was gathered in an interactional context and that generalizing from it may not be appropriate.

Another troublesome issue arises when you have seen a family, they subsequently divorce and you receive a waiver from one of the parents to release records of their child to another therapist. This may seem a simple and straight forward situation, but all may not be as it seems. For example, not having seen the family in some time, one cannot know what has transpired. While the request may be for nothing other than obtaining further help for the child, for all you know, the parents could be in a bitter child custody battle and the records have been requested to assist one side or the other in the conflict. To make matters worse, you have no idea if the parent who requested the information has the legal right to release you. Therefore, the prudent practitioner will ask the requesting parent to have his or her attorney send you the controlling legal documents before releasing the data.

A more difficult situation arises when the psychologist receives a subpoena with a

waiver from a former patient who is now is a child custody dispute with his wife, and you have co-mingled records. A common error is to assume that the psychologist must tender the records. This is not the case. The psychologist's obligation is to respond to the subpoena, but not necessarily to provide the records unless released by all the competent parties or ordered to do so by the court. In such a case one strategy is to call the attorney and respectfully refuse to provide the requested information because you have co-mingled records and offer to release them upon receipt of a waiver from the wife. If the wife refuses to agree to the release, the father's lawyer may try to pressure you. At that juncture, you must remain firm and offer to surrender them when ordered to do so by the court. To do otherwise risks violating the wife's privilege and courts disaster.

If the attorney is undeterred, and you feel that release of the information would be harmful to one or both parties, the psychologist is always free to hire his or her own attorney to file a motion to quash the subpoena. One way or another, if a court of competent jurisdiction orders that the records be surrendered, then you do so. No harm will come to you so long as you are obeying the court since doing so takes precedence over both ethical guidelines and state board regulations.

Integrating Clinical Ethical and Legal Issues

In all of this one goal should be clear. The idea is to do what is legal, ethical and clinically indicated. I recognize that this is not always possible, but it is often an achievable goal and one that we should strive for. For example, I saw a couple over an extended period of time who had chronic conflict that never was resolved despite my best efforts. Not surprisingly they separated and quickly became involved in a custody dispute. Within weeks, I had subpoenas from both their attorneys for my records along with their waivers. I responded to the subpoenas by calling both attorneys explaining that I could not release information to them because I had co-mingled records. I assumed that would be the end of it. Much to my surprise I soon received releases from both parties to

release information to the other's lawyer. That is, John released me to give information regarding him to Susie's lawyer, and she released me to give information about her to his.

How can this be you ask? Well, systemically oriented approaches generally advise that the therapist remain neutral in order to maximize treatment effectiveness. I guess I'd done pretty well since both were confident that my records would show them in a positive light, and then of course I would have become triangulated into their conflict. In fact, nothing could have been further from the truth. He was remote, aloof, cool, rigid and had little contact with his emotional life preferring to be calm and rational. She was emotional, labile, inconsistent, and never saw a boundary she couldn't blur. In short, I really didn't think either would be a particularly good single parent. So in this case, I felt it would be harmful to the parties to release the information to anyone. As a result I called each lawyer, explained the situation, with emphasis on my feelings about their individual client. Once they heard what I had to say, and realized that I could not help, they left me alone. By proceeding in this way, I complied with the law, reduced my risk of exposure and avoided hurting my former patients who were already experiencing enough pain. But be aware. Next time I may not be so fortunate.

Finally, what if after doing my best, and jumping through all the legal hoops, I am forced to testify. In my view, therapists ought not to be involved in legal disputes due to the high probability of harming the professional relationship. Since it was my assumption that the information I divulged might be harmful, I would ask the attorney if she or he would allow me to speak with his or her client and discuss the testimony before hand. Having such a meeting would at least prepare the former patient for what I would say, give me the opportunity to explain myself and hopefully reduce distress. This is not a perfect solution, but it does go the extra mile and that is an ethically appropriate thing to do.

Conclusion

After listening to me, some of you may decide that working with couples and families, especially in the context of our litigious times is not worth it. While I would understand and respect your position, I would also feel sad that you had forgone the opportunity to work in an exciting and challenging area of our profession where you have the opportunity to do much good. Family Psychology is not for the faint of heart, but then again, neither is life. I urge you to persevere.